# Giving Credit Where Credit is Due?: The Unusual Use of Arbitration in Determining Screenwriting Credits

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## I. INTRODUCTION

In Hollywood, the appearance of power is itself power.[1] This Hobbesian view[2] is derived in part from the nature of the business; as the adage states, you are only as good as your last film.[3] Industry decisionmakers often base employment decisions and financial compensation for creative talent—actors, directors, writers—on the talent's previous body of work, especially the most recent film project on which the talent has performed. While some individuals can transcend a failed project and remain powerful enough to command top jobs with the accompanying top salaries,[4] the situation of the screenwriter is generally distinctly different. The screenwriter is most often perceived as essentially dispensable within the industry in relation to the other significant creative elements, such as the director and actors. Such lack of status pervades how

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[1] *See* 1 THOMAS D. SELTZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 6.04, at 6-15 to 6-16 (2d ed. Clark Boardman Callaghan 1996) (1992) (discussing application of this principle to film distributors).

[2] *See* THOMAS HOBBES, LEVIATHAN 62 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) ("Reputation of Power, is Power . . . .").

[3] *See* WILLIAM FROUG, ZEN AND THE ART OF SCREENWRITING 265-266 (1996).

[4] Actor Sylvester Stallone provides a prime example. Stallone entered into the ranks of a leading man with 1976's *Rocky*, for which he reportedly received only the then-industry minimum for his acting, $20 thousand for the screenplay and an unexpectedly lucrative 10% of the film's profits. *See* EDWARD GROSS, ROCKY AND THE FILMS OF SYLVESTER STALLONE 13 (Hal Schuster & Bob Garsson eds., 1990). Following the success of *Rocky*, Stallone starred in *F.I.S.T.* and *Paradise Alley*, two box office failures, before making the successful *Rocky II*. Another failure, *Victory*, followed, bringing Stallone's track record for lead roles in mainstream films to two hits out of five films. Nevertheless, he was paid ten million dollars for *Rocky III*. *See* WILLIAM GOLDMAN, ADVENTURES IN THE SCREEN TRADE 26 (1983). More than a decade later, Stallone's domestic allure has waned, resulting in his having had few domestic hits in the last five years, but his salary is now $20 million per picture, thanks in part to his strong international draw. *See* Beth Laski, *Meyer Makes Noise with $60 Mil Stallone Pact*, VARIETY, Aug. 14, 1995, at 5, 12.

a screenwriter is treated, as accolades for a successful project rarely attach to the screenwriter.[5] Yet, in an industry in which jobs depend upon an individual's track record, the existence of any track record may be viewed as preferable to having no official screenwriting credits to one's name.[6]

Herein lies the issue of interest to parties concerned with methods of alternative dispute resolution. For the screenwriter, receiving credit for having written for a film is not always a certainty, and is indeed often improbable, given that only a limited number of writers may receive credit.[7] It is not uncommon for a multitude of professional screenwriters to work on a single screenplay, rewriting one another's work in an effort to create a script that the film's producers, director, actors (if they have enough clout) and the studio bankrolling the project will all find acceptable.[8] When the time comes for determining who receives credit for the completed script, disagreements often arise, and when no agreement can be reached as to whose name should appear on the silver screen, it is in the interest of the industry to quickly resolve the problem. The movie must make its release date, and waiting for the often extended wheels of litigation to turn may prove disastrous. As a result, the industry has turned toward a quicker means of resolving the question of who receives credit—who establishes another line on his or her resume, which, if the film is a success, may mean significant future writing opportunities and paychecks—

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[5] *See* HAROLD ORENSTEIN & DAVID E. GUINN, ENTERTAINMENT LAW & BUSINESS: A GUIDE TO THE LAW AND BUSINESS PRACTICES OF THE ENTERTAINMENT INDUSTRY, § 9.5, at 9-17 ("[C]redit for a successful film is most often given to the director, its stars, or the producer rather than its writer.").

[6] *See* discussion *infra* Part II.B.

[7] The Writers Guild of America, Inc. (WGA), the screenwriters' union, has entered into an agreement with Hollywood's creative community which provides that only up to three screenwriters may receive "Screenplay by" credit, no matter how many authors contributed to a script. For a discussion of the basic credits which may be given and their related requirements, see *infra* Part III.C.

[8] *See* Benjamin Svetkey, *Who Killed the Hollywood Screenplay?*, ENT. WKLY., Oct. 4, 1996, at 32, 36-37. Most films, regardless of what the credits read, have been worked on by numerous writers. For example, *Eraser* and *The Rock* each had seven screenwriters. *See id. The Flintstones* is attributed to at least 32, *see id.*, with as many as 35 writers who made contributions. *See "Flintstones" Scripters Locked Out*, VARIETY, Jan. 31, 1994, at 8. The use of multiple screenwriters is nothing new; *Gone With the Wind* is the work of 16 scribes. *See* STEPHEN F. BREIMER, CLAUSE BY CLAUSE: THE SCREENWRITER'S LEGAL GUIDE 1 (1995).

and who receives no credit, with the accompanying lack of related dividends. The industry has embraced the use of arbitration.[9]

Yet, the method of arbitration employed in determining screenwriting credits differs substantially from the more traditional method of arbitration. During screenwriting credit determinations, the identity of the arbitration panel members responsible for reaching a decision is always kept secret, even from one another; the decision reached by the panel is not explained, as no explicit reasons are given to the screenwriters. Further, the decisionmaking process, while highly structured procedurally, is arguably guided by relatively open-ended substantive standards where the unexplained personal judgment and preferences of the arbiters is regarded as sufficient. The complaint is that the system is unfair, sacrificing a degree of justice by meeting the industry's need for speed. At stake are reputations, livelihoods, fairness and literally millions of dollars.

The purpose of this Note is to describe the unusual manner in which arbitration is employed within this aspect of the film industry, where, as in many areas of commerce, lengthy litigation would disrupt corporate strategy, damage individual worker's career development and potentially impact revenue to such a degree that the result would be the failure of business enterprises altogether. Part II of this Note sets forth the necessary context for appreciating the nature of the film industry and the often precarious financial stability confronting industry players, and also explains the status and function of the screenwriter and the significant role credits play in shaping future work allocation and income. In Part III, the credits determination process adopted by the industry is examined in detail, and in Part IV, the most prominent legal challenges that have been brought against this method of arbitration are discussed, with attention paid to some of the precedents' impact on implementing comparable methods of arbitration in various fields, both similar and dissimilar to the film industry. Part V examines how well the credits arbitration procedures satisfy the advantages

[9] It should be noted that credits arbitration is not the industry's exclusive area in which alternative dispute resolution is employed; in fact, arbitration is pervasive within Hollywood, preferred over litigation by industry players, as "almost every collective bargaining agreement contains some form of arbitration mechanism." 2 SELTZ ET AL., *supra* note 1, § 21.17, at 21–49. For several commendable overviews of the use of arbitration in resolving disputes in Hollywood, see *id.* at 21–49 to 21–73; Richard L. Feller, *Let Me Count The Ways—Dispute Resolution in the Entertainment Industry*, 4 ENT. & SPORTS LAW. 1 (1985). *See also* Melvin Simensky, *The Importance of Arbitration in Entertainment Industry Dispute Resolution* (pts. 1–3), N.Y. L.J., Mar. 1, 1985, at 6, Mar. 8, 1985, at 5, Mar. 15, 1985, at 5.

to be found in the traditional arbitration model. Finally, Part VI presents some general conclusions of interest to individuals involved in structuring methods of dispute resolution, which demand quick resolution and possible concealment of party identity.

## II. BACKGROUND INFORMATION

### A. *The Nature of the Film Industry*

The motion picture industry, all artistic considerations aside, is big business masquerading behind the facade of an entertaining and socially conscious spectacle. In 1996, domestic box office revenue reached $5.92 billion, an all-time high, and ticket sales reached its largest volume in thirty-seven years with an estimated 1.35 billion admissions sold.[10] Additionally, international markets have become an increasingly prominent source of revenue, with studios now thinking globally in making production, marketing and casting decisions.[11] Film is the United States' second leading positive export; the industry created a $3.5 billion trade surplus in 1993.[12]

Yet, despite the large numbers, the film industry is built upon a precarious foundation. The nature of the industry has been an increasing movement toward production of instant hits; although a record number of movie theaters exist, exhibitors who display motion pictures in their theaters are increasingly reluctant to continue showing a film unless it is a clear blockbuster.[13] Studios are quite cognizant of the fact that if a film

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[10] *See* Brian Fuson, *Speeding Tickets Fuel B.O.*, THE HOLLYWOOD REP., Jan. 2, 1997, at 1. Domestic box office revenue includes the United States and Canada. *See id.* at 39.

[11] *See* DONALD E. BIEDERMAN ET AL., LAW AND THE BUSINESS OF THE ENTERTAINMENT INDUSTRIES 6 (3d ed. 1996). "American film, television, record, and music publishing companies now derive more than half their revenues from foreign markets . . . and must therefore consider the tastes of consumers in other countries as much as those of U.S. consumers." *Id.*

[12] *See* Karen L. Gulick, *Creative Control, Attribution and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53, 55 n.2 (1994) (citing *Hearings on H.R. 3051 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Judiciary Comm.*, 102d Cong. 186 (1992) (statement of Daniel Jaffee, Committee for America's Copyright Community)).

[13] *See* Fuson, *supra* note 10, at 50.

does not open well—if it does not enjoy a lucrative first weekend—it is likely to be quickly forgotten as the public and industry turn their attention to the next potential hit.[14] One industry analyst has estimated that out of ten motion pictures, seven will fail to recoup production costs, two will attain the break-even point and only a single film will actually produce a profit.[15] The hit films must yield enough revenue to enable a studio to endure numerous failures while concurrently investing capital into the development of new, promising features.[16] Coupled with effectively satisfying the constant demand for high-yielding products are pragmatic concerns: escalating budgets, increasing marketing costs[17] and potential loss of revenue in payout to creative talent with enough clout to demand a percentage of the ticket sales.[18]

The costs associated with motion picture production are staggering. Many films are the end result of development, in which a film studio's development funds are used to hire a screenwriter to draft a script for a potential motion picture.[19] Estimates have placed the number of films in development as between ten and twenty times the number of films actually produced, with a large percentage of these development deals never resulting in a produced film—meaning that the money expended on a failed project's development is lost.[20] Such development must continue, though, given the huge investment and high risk atmosphere; a steady flow of

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[14] *See* 1 SELTZ ET AL., *supra* note 1, § 2.06, at 2-18 (citing Hollie, *Hollywood Strategy for Summer Films*, N.Y. TIMES, June 26, 1981, at D1, D4).

[15] *See id.* (citing *Fox Re-States Vow Vs Anti-Bid States*, VARIETY, May 6, 1982, at 6, 28).

[16] *See id.* § 3.04, at 3-22 to 3-23.

[17] *See* Stephen Galloway, *Stirred by Boxoffice, but Shaken*, THE HOLLYWOOD REP., Jan. 8, 1997, at 1, 50.

[18] *See* 1 SELTZ ET AL., *supra* note 1, § 2.06, at 2-18.

> One entertainment industry commentator observed: "[E]ven with huge grosses, the deals given top talent make it difficult for the studios to show healthy profits. In [the film] Hook, for example, director Steven Spielberg and stars Dustin Hoffman, Julia Roberts, and Robin Williams are reportedly receiving a total of 40 percent of Tri-Star's first $50 million earned by the studio."

*Id.* (citing Soocher, *Film Industry Faces Historic Crossroad; Across-the-Board Changes*, ENT. L. & FIN., Jan. 1992, at 1.

[19] *See* 1 ERIC B. YELDELL, THE MOTION PICTURE AND TELEVISION BUSINESS: CONTRACTS AND PRACTICES § 1.04, at 1-7 (2d ed. 1987).

[20] *See* 1 SELTZ ET AL., *supra* note 1, § 2.06, at 2-19.

multiple projects allocates risk and increases the possibility of releasing a high-yielding product.[21] Other benefits also accrue:

> A steady product flow increases a company's chance for survival for several reasons: a steady product flow makes it easier to cover fixed overhead costs; a steady product flow gives the source of that flow more leverage in the marketplace; and a steady product flow leads to increased acceptance by retailers and consumers of other projects from the source.[22]

Should a film achieve actual production, budget costs can easily exceed initial allocations, thus creating a costly drain on financial resources.[23] The average cost of producing films that do remain within their given budgets has continued to rise, resulting in immense aggregate filmmaking costs.[24] Often, the results are less than rewarding. For example, although a record number thirteen films reached true domestic "blockbuster" status in 1996,[25] a larger number of expensive motion pictures performed poorly.[26] New pictures with potential blockbuster capacity must be in the development

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[21] *See id.* § 3.04, at 3-20.

[22] *Id.* § 3.06, at 3-35.

[23] *See id.* § 2.06, at 2-19. One of the more infamous examples of spiraling budget costs is the 1980 film *Heaven's Gate*, which initially had a projected budget of $7.5 million. The final cost of the film eventually exceeded $40 million. *See id.* (citing *Film "Heaven's Gate" Taken Off Market*, N.Y. TIMES, Nov. 20, 1980, at C24). A more recent disappointment was the Arnold Schwarzenegger vehicle *Last Action Hero*, initially budgeted at $45 million, with the final budget an estimated $82 million. *See id.* at 2-20 (citing Seigel, *Sputtering Box-Office Action Grounding $82 Million 'Hero,'* CHICAGO TRIB., July 16, 1993, § 3, at 1).

[24] *See* 1 SELTZ ET AL., *supra* note 1, § 2.08, at 2-3 to 2-4.

[25] *See* Fuson, *supra* note 10, at 39. Blockbuster status is achieved by a film grossing $100 million or more domestically; the 13 films produced an estimated box office take of $1.9 billion. *See id.*

[26] For example, New Line Cinema financed the action-adventure picture *The Long Kiss Goodnight* for reportedly around $70 million, expended another $25 million in marketing costs and saw a domestic gross of $33.1 million in return. *See Bad Timing for New Line Troubles*, THE HOLLYWOOD REP., Jan. 8, 1997, at 56. That same year New Line experienced similar disappointments with the Marlon Brando film *The Island of Dr. Moreau* ($50 million budget, $28 million box office) and *Last Man Standing*, starring Bruce Willis ($57 million budget, $18.1 million gross). *See id.* Wall Street estimates of New Line's value decreased from $1.2 billion to $800 million during 1996. *See id.* Such box office results are hardly unique to New Line, as a comparative study of the major industry players would reveal essentially similar results.

process, ready to be released to attempt to pick up where another one or two—or dozen—other films have failed.

The motion picture industry, then, is almost paradoxical in its character. It is a spectacle, entertaining and provoking and sometimes illuminating, and it is big business, where commercial failure is commonplace and the need for the next big hit drives the industry practices and concerns. Constant product is needed to survive, and failure to release multiple films with the potential for high box office returns on a regular basis could ultimately mean the demise of the studio or production company funding a project. From this demand for continual product grows the overwhelming need for quick resolutions to disputes that disrupt the precarious balancing in which industry players find themselves involved; for both larger industry players and independent companies alike, extended litigation could consume valuable time. Failure to place a potential hit film in the theater could easily mean the loss of the opportunity to place another film into exhibition—whether due to irreparable financial ruin or loss of leverage and credibility.[27]

Coupled with this need to resolve disputes quickly is the desire to resolve them in a way that preserves relationships. The entertainment industry in general "is a relatively small business with only a handful of companies that have sufficient financing to back entertainment projects, and only a relatively few people with the special spark of creativity to produce the blockbusters on which the industry depends."[28] As a result, the likelihood that parties to a dispute will encounter one another again in the

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[27] "For example, due to a lack of steady product flow, independent movie producers have an increasingly difficult time in getting theaters to exhibit their films and in obtaining foreign distributors to distribute their movies." 1 SELTZ ET AL., *supra* note 1, § 3.06, at 3-36 (citing Murphy, *US Independents Down*, VARIETY, June 13, 1979, at 18). While the situation for independent producers has arguably improved in recent times, some analysts believe that there is an oversaturation of independent films on the market, causing smaller independents difficulty in securing and retaining exhibition on screens and creating pressure to produce a larger gross early on for all distributors. *See* Joseph Steuer, *The Indies: Too Much of a Good Thing*, THE HOLLYWOOD REP., Jan. 9, 1997, at 1, 54.

[28] 1 SELTZ ET AL., *supra* note 1, § 7.06, at 7-11. The entertainment industry encompasses the film industry. There is an increasing trend toward attaining synergy among the various facets of the larger entertainment industry, with the emergence of corporate giants whose interests cross over into film, television, live theater, music and print publishing. *See generally* 1 SELTZ ET AL., *supra* note 1, at ch. 1, 3.

course of their respective careers is high.[29] The relatively closed nature of the film industry creates a disincentive to alienate others who may experience a subsequent rapid rise in power; the need to resolve disputes is balanced against the need to retain ongoing relationships.

## B. *The Screenwriter and the Importance of Credits*

There are two basic ways in which a screenwriter receives work. The more prominent method is to accept writing assignments, in which the screenwriter will work with a studio or production company (or both) to develop a script from a story idea; the idea need not originate with the writer. In addition, a screenwriter may be brought in to rewrite another writer's script entirely, or to "polish" various story elements, such as dialogue or plot.[30] Such practices, termed script doctoring, can be especially lucrative; it is not uncommon for top screenwriters to doctor a script for anywhere from $150,000 to $200,000 per week[31]—with no expectation of ever receiving credit on screen.[32]

The second method of writing for film involves the screenwriter producing a "spec script"—a script written on speculation, with no guarantee of making a sale.[33] Sales of spec scripts often receive increased attention both in and outside the industry, with formerly unknown writers who had never made a sale suddenly receiving hundreds of thousands of dollars—sometimes more—for spec scripts.[34] Such success has been compared to winning a screenwriting lottery,[35] but the prospects of making

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[29] *See id.* § 7.06, at 7-11.

[30] *See* BROOKE A. WHARTON, THE WRITER GOT SCREWED (BUT DIDN'T HAVE TO) 137 (1996).

[31] *See* Dan Cox & Ted Johnson, *ARB Imbroglio Roils Writers*, VARIETY, Dec. 4, 1995, at 7.

[32] *See infra* Part III. Screenwriter Jonathan Lemkin, for example, polished story elements on the Sylvester Stallone film *Demolition Man*, but received no credit. *See* John Brodie, *Spec Script Lotto Leaves Some Pic Scribes Blotto*, VARIETY, July 18, 1994, at 15.

[33] *See* WHARTON, *supra* note 30, at 137. For example, A-list screenwriter Shane Black sold his spec script to New Line Cinema for $4 million, *see* Paul F. Young, *Hollywood Squeezing Scripters*, VARIETY, April 17, 1995, at 50, yet the results were disappointing. *See supra* note 26.

[34] *See* Brodie, *supra* note 32, at 9.

[35] *See id.*

such a sale[36] and of sustaining a career after the initial sale[37] do not lie in the writer's favor.

Ultimately, both methods of writing for motion pictures often depend upon one thing, credits. Amid the Hollywood atmosphere of continual risky investment and pursuit of successful material, the screenwriter occupies an interesting position. The screenwriter is the beginning of the filmmaking process, serving an integral function that is wholly indispensable.[38] However, "[w]riters hold a unique position in the motion picture and television industries—a position of both respect and disdain. . . . The status of writers in the metaphoric Hollywood is merely that of another employee of the producer."[39] This apparent dichotomy is an outgrowth of the paradoxical nature of the industry, where while everyone wants to produce the next successful script, everyone also wants to avoid failure—or perhaps more specifically, the industry decisionmakers want to avoid the appearance of fault. Consequently, it is not uncommon for screenwriters to be routinely closed off from the filmmaking process after the script has been delivered and any contractually-required opportunities for rewriting have been allowed by the producer,[40] or to be shut out of consideration for writing assignments altogether due to a lack of perceived status[41]—status derived not necessarily from talent, but from credits received on past

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[36] Competition among spec writers is fierce. The Writers Guild of America provides a registration service through which professional and aspiring screenwriters may register material such as scripts; in 1988, the year in which the collective bargaining agreement cited in this Note was implemented, there were over 40,000 scripts registered—and not even 120 films were produced. *See* SYD FIELD, SELLING A SCREENPLAY: THE SCREENWRITER'S GUIDE TO HOLLYWOOD 5 (1989).

[37] *See* Brodie, *supra* note 32, at 9.

[38] *See* FIELD, *supra* note 36, at xv.

[39] ORENSTEIN & GUINN, *supra* note 5, § 9.5, at 9-16 to 9-17; *see also* BREIMER, *supra* note 8, at 1 ("Since the inception of the film *business*, studios have considered the screenwriter a disposable employee. *Hired help.*") (emphasis in original).

[40] *See* ORENSTEIN & GUINN, *supra* note 5, § 9.5, at 9-17. ("[S]creenwriters retain little or no control over their work. Even in situations in which the writer creates an original scenario, it is sold to a producer outright, and the producer reserves the absolute right to alter, change, or rewrite the scenario as he or she may elect."); *see also* FROUG, *supra* note 3, at 263-266; Gulick, *supra* note 12, at 117 n.67 (citing Goldman, *The Screenwriter*, *in* THE MOVIE BUSINESS BOOK 59 (Jason E. Squire ed., 1983); MARK LITWAK, REEL POWER 174-176 (1986)).

[41] For a fuller exploration of this concern, see the remaining discussion *infra* Part II.B.

financially successful films.[42] Such credit has been defined by one screenwriter as "the lifeblood of everyone in this industry"[43] due to its potential impact upon a screenwriter's career "screen credit is probably the single most important factor for artists in the entertainment business. . . . [t]his factor determines who is "hot" and who is not; it is the basis for determining whether artists are offered subsequent assignments and their increase in compensation for those assignments."[44]

The desire to avoid failure by looking to credits in making executive decisions has helped contribute to an industry mentality emphasizing "hot" screenwriters over lesser known scribes: "Whether it's to lure a star or to cover themselves in case of a flop, many studio execs today are more comfortable paying a 'name' screenwriter $1 million to write a draft than hiring a seasoned but less glitzy veteran scribe for less than half that amount."[45] This mentality

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[42] Yet, even possessing credit on financially unsuccessful projects is better than having no credits at all:

> Even if the project as a whole is a failure . . . [receiving credit] for the venture is important for those people whose contributions have been favorably received. . . . [T]he recognition value of billing increases even for the credit recipients whose contributions have been unfavorably received. . . . [T]he mere fact that a venture has been produced, or a person employed, at all is helpful in obtaining further work opportunities.

1 SELTZ ET AL., *supra* note 1, § 9.05, at 9-10.

[43] Cox & Johnson, *supra* note 31, at 14.

[44] Robert Davenport, *Screen Credit in the Entertainment Industry*, 10 LOY. L.A. ENT. L.J. 129, 129 (1990). The WGA 1996 Screen Credits Manual reflects this belief, stating that "[a] writer's position in the motion picture or television industry is determined largely by his/her credits. His/her salary status depends on the quality and number of the screenplays, teleplays, or stories which bear his/her name." Writers Guild of America SCREEN CREDITS MANUAL (1996 revision) at i [hereinafter WGA MANUAL]; *see also* 1 SELTZ ET AL., *supra* note 1, § 9.05, at 9-20 to 9-22 (discussing how credits may be used: to obtain a job, to negotiate a higher salary, to possess the leverage to pick and choose jobs and to obtain contingent compensation); YELDELL, *supra* note 19, § 14.02 (A), at 14-9. Courts have routinely recognized the value of screenwriting credit, *see* 1 SELTZ ET AL., *supra* note 1, at 9-7 to 9-8, with one court stating that "[a] writer's reputation, which would be greatly enhanced by public credit for authorship of an outstanding picture, is his stock in trade." *Id.* at 9-8 (quoting Poe v. Michael Todd Co., 151 F. Supp. 801, 803 (S.D.N.Y. 1957)).

[45] Young, *supra* note 33, at 1.

> reflects the paranoia felt by studio executives who don't read much themselves, or who fear rocking the corporate boat. . . . [A] producer with a studio deal explains, "[The executives] think an expensive writer will get it right the first time. And if he doesn't, the executive has protected himself by using a pre-approved writer."[46]

The pre-approved writer mentality has resulted in an inordinate amount of work allocated to those screenwriters perceived as hot writers within the industry, an estimated thirty or so individuals.[47] While some studios actually circulate a list of acceptable hot writers for writing assignments, other studios require their executives to commit the roster to memory.[48]

The result of such a credit-based, hit-based mentality has had a significant economic impact upon the screenwriting community. In 1995, the screen and television writers' union, the Writers Guild of America, Inc. (WGA), reported record earnings of $535.8 million by its members, with the top fifty screenwriters providing for approximately one-half of 1995's income growth. The WGA has 11,000 members,[49] a membership which grew by an estimated one to two screen or television writers joining per day,[50] of which approximately 1680 screenwriters were employed in 1995.[51] Yet, only the top one percent of employed writers enjoyed the

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[46] *Id.* at 50.

> One of the town's top agents offers similar insights. "For some reason, a whole crop of new execs sprang up in the '90s who had no historical knowledge of the business, and they would only hire who they thought would do it right. And that was the famous writers who'd gotten it right within the past couple of years."

*Id.*

[47] *See id.*

[48] *See id.*

[49] *See* 1 SELTZ ET AL., *supra* note 1, § 1.07, at 1s-1 (May Supp. 1997). The actual number of WGA members with "active" status, however, is 7,825 writers. *See* 1997 WGA REPORT TO WRITERS at 9 [hereinafter WGA REPORT].

[50] The figure for 1995 has been given variously as 346 members joining, *see* Ted Johnson, *WGA: Top Scribes Hit Earnings Jackpot*, VARIETY, Jan. 8-14, 1996, at 18, and as 520 members joining. *See* Steve Schlich, *Writer's News*, CREATIVE SCREENWRITING, Summer 1996, at 119, 121. The Writers Guild places the number at 504. *See* 1997 WGA REPORT, *supra* note 49, at 10.

[51] *See* Johnson, *supra* note 50, at 18. It must be noted that the figures in the preceding discussion are estimates, as the 1997 WGA Report to Writers contains several similar, but conflicting, numbers. For example, the WGA reports that in 1995, 1667 screenwriters were employed with their combined earnings totaling $310.5 million of

extremely lucrative six to seven figure paydays, as the median income of a Guild member was a lesser $62,000.[52] In addition to the up-front payment for drafting a script, credit on a film can produce other fiscally rewarding dividends depending upon contractual negotiations: residual payments, royalty payments, percentage of profit participation in gross receipts and percentage participation in film-related products.[53] Credits, then, determine perceived status within the industry, which in turn determine future work allocation and income. As a result, competition for credit has become increasingly important, and disputes requiring resolution have become commonplace, with between twenty-five to thirty percent of all films brought before the WGA resulting in Guild-conducted arbitration designed to quickly and efficiently determine to whom credit is due.[54]

## III. THE WGA CREDITS DETERMINATION PROCESS[55]

### A. *The Road to Arbitration*

In an effort to minimize delays in releasing films, the film industry routinely employs arbitration in place of extended, resource-consuming litigation.[56] Many business relationships in Hollywood are governed by collective bargaining agreements that establish minimum terms of employment and provide for use of arbitration, as main creative talents such as producers, directors, actors and writers are represented in the

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the $582.8 million earned under WGA contracts. *See* 1997 WGA REPORT, *supra* note 49, at 8. The numbers for 1996 show an increase in all categories, with 1735 employed screenwriters earning a total of $352.1 million of a total $652.6 million earned under WGA contracts. *See id.*

[52] *See* Schlich, *supra* note 50, at 121.

[53] *See* Steven E. de Souza, *Movie Credits as the Writers' Tombstone: Screen Ain't Big Enough for All of Them*, L.A. TIMES, Jan. 21, 1990, at M4. Participation in film-related merchandise can be especially lucrative; in one of the more successful, albeit extraordinary examples, licensed merchandise from the *Star Wars* trilogy of films has generated $4 billion in sales. *See* Steve Daly, *The Remaking of Star Wars*, ENT. WKLY., Jan. 10, 1997, at 18, 22.

[54] *See* Cox & Johnson, *supra* note 31, at 14.

[55] All references to the WGA collective bargaining agreement are by necessity to the 1988 Minimum Basic Agreement (extended in 1992); as of this writing, the most current agreement has not yet been published by the WGA.

[56] *See* discussion *supra* note 9.

aggregate by job-specific unions.[57] Of particular interest here is the WGA's Minimum Basic Agreement, which governs the determination of valuable screen credit and provides for Guild arbitration to diffuse potentially disruptive delays arising from credit disputes.

Originally, screenwriting credit was often beyond the reach of the screenwriter. Although many screenwriters received credit for their contributions, other writers saw their efforts degraded as studio executives or producers gave either partial or full writing credit to their secretaries, relatives and even bookies[58] and mistresses.[59] Other screenwriters were unable to receive credit due to Hollywood blacklisting in the era of McCarthyism.[60] Through negotiations, the WGA assumed responsibility for determining screen credits in 1941[61] so that all Guild signatories—those studios and production companies that have entered into contracts incorporating the WGA collective bargaining agreement—have agreed to give only the specific type of approved credits in the particular manner set forth by the Guild.[62] Several characteristics define the WGA credit determination process: "(1) only specified writing credits may be awarded, (2) credits will be awarded based upon the contributions of the writers involved, (3) in no event may more than a few writers share a writing credit, and (4) the WGA is the final arbiter of who is to be awarded writing credit."[63]

As provided in schedule A of the WGA Minimum Basic Agreement, initial responsibility for determining credit lies with the signatory production company producing the film. The signatory production company, after weighing the respective contributions of all participating

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[57] *See* 1 SELTZ ET AL., *supra* note 1, § 1.07, at 1-24 to 1-28.

[58] *See* Robert Eisele, *Arbitration is the Way to Go*, L.A. TIMES, July 1, 1996, at F3.

[59] *See* de Souza, *supra* note 53, at M4.

[60] *See, e.g.*, Terry Pristin, *Mending "Broken Arrow": Writers Guild Considers Award for Blacklisted Screenwriter of 1950 Film*, L.A. TIMES, June 29, 1991, at F1.

[61] *See* Eisele, *supra* note 58, at F3.

[62] The 1988 WGA Basic Agreement provides in relevant part that "[t]he [production] Company agrees that credits for screen authorship shall be given only pursuant to the terms of and in the manner prescribed in the applicable schedule A . . . ." WRITER'S GUILD OF AMERICA 1988 THEATRICAL AND TELEVISION BASIC AGREEMENT, art. 8, at 36 [hereinafter 1988 WGA AGREEMENT].

[63] YELDELL, *supra* note 19, at 14-9.

writers[64] involved with a project, must send notification of tentative credits to the writers or a writer's agent if so designated by the writer. The WGA will also receive such notification, in addition to a copy of the final shooting script or the most revised script available.[65] Upon receipt of the company's proposed credits, a participating writer who is in agreement need not respond, as failure to file a proper protest will be regarded as agreement or acquiescence. Before agreement or disagreement is expressed, a participating writer may discuss the proposed credits with other writers on the project. After reading the final script or most available revised screenplay, should a participating writer disagree with the tentative credits, she must notify in writing both the production company and the WGA within the time period specified on the proposed credits notice (which cannot be less than called for in the collective bargaining agreement).[66] Once the Guild has received official notification of protest, several pre-arbitration procedures may ensue.[67]

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[64] Who constitutes a participating writer eligible to participate in the determination of writing credits includes:

> [A]ny writer who has participated in the writing of the screenplay or teleplay, or any writer employed by the company on the story, or any writer who sold or licensed literary material subject to WGA Agreement on which the screenplay or teleplay is based, or if the applicable picture is a remake, any writer who received story, screenplay, or teleplay credit under a WGA Agreement on the prior version of the picture.

YELDELL, *supra* note 19, at 14–14 n.24; *see also* 1988 WGA AGREEMENT, *supra* note 62, at 276–315; WGA MANUAL, *supra* note 44, at 3 .

[65] *See* WGA MANUAL, *supra* note 44, at 3. *See also* YELDELL, *supra* note 19, at 14–14.

[66] *See* WGA MANUAL, *supra* note 44, at 4. *See also* YELDELL, *supra* note 19, at 14–14. The telegram (or fax) must read: "Have read final script and hereby protest tentative credits on (name of production) and consider credit should be." WGA MANUAL, *supra* note 44, at 4.

[67] The Guild itself may also instigate arbitration under a number of circumstances. The WGA reserves the right to commence arbitration on behalf of a screenwriter who has declined to review or protest credits "on the grounds that a credit, like a minimum wage, is an economic matter for all writers." WGA MANUAL, *supra* note 44, at 15. Such protest may be commenced even if the screenwriter in question opposes the Guild action. *See id.* Further, credit arbitration has been deemed mandatory by the Guild whenever a production executive—a writing director or a writing producer—seeks writing credit, unless the executive is the exclusive writer on the project. *See id.* at 13–14. Several unique rules govern mandatory arbitration for production executives seeking

## B. *Pre-Arbitration Procedures*

Prior to commencement of arbitration, which by Guild rules must be limited to no more than twenty-one business days time from the initial protest to the eventual decision,[68] all participating writers involved with a film project may meet and collectively decide among themselves who should receive writing credit and in what form the credit should be stated. The meeting may be organized by any participating writer or may be arranged by the Credit Arbitration Secretary if it appears there is the possibility of resolution. Should agreement be achieved, it must be unanimous and the agreed-upon form of credit must correspond to the approved forms provided in Schedule A of the WGA Minimum Basic Agreement.[69] Such determinations have resolved disputes without proceeding into actual arbitration.[70] Should no resolution be attained, however, the dispute will proceed to arbitration.

When necessary, WGA procedures provide for a three-member special committee drawn from the ranks of those sitting on the Screen Credits Committee to conduct a pre-arbitration evidentiary hearing. At the hearing, the committee will resolve through binding determinations any disputes over the material to be submitted for arbitration; the participating screenwriters may attend and present testimony and documentary evidence

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writing credit. While participating writers may normally unanimously agree on credit determinations prior to arbitration, in this instance "the participating writers may not make a binding agreement as to the credit to be awarded, and the WGA will be deemed to have made a written request for arbitration at the time the production company submits the notice of the tentative writing credits." YELDELL, *supra* note 19, at 14–14.

[68] *See* WGA MANUAL, *supra* note 44, at 6. In the case of emergencies, a production company may request expedited action in which a decision will be rendered within 10 days; even more condensed timetables may be considered if warranted. *See* 1988 WGA AGREEMENT, *supra* note 62, at 285.

[69] *See* WGA MANUAL, *supra* note 44, at 4. However, the WGA may issue a waiver permitting forms of credit not provided for in its Screen Credits Manual. *See id.* at 13.

[70] *See* de Souza, *supra* note 53, at M4. One screenwriter has claimed—perhaps facetiously, given the importance of credits—that credit determinations have been resolved by the flip of a coin. *See id.*

in an effort to establish "the authenticity, identification, sequence, authorship or completeness of any literary material to be considered."[71]

Finally, before a credit dispute is submitted to arbitration, writers may exercise their last right to withdraw their names from the project for personal cause, whether based on principle or due to perceived mutilation of their work. Should other writers on the project dispute the withdrawal, the matter shall enter into arbitration to determine if personal cause exists. Such withdrawal from screenplay credit must occur prior to arbitration, however, as post-arbitration credits are held irrevocably binding.[72]

### C. *Arbitration Structure and Procedures*

Upon the need for actual arbitration, the WGA Screen Credits Manual provides that the Credit Arbitration Secretary shall assemble a three-person arbitration committee. All parties to the forthcoming arbitration are provided with a screen arbiters list containing the names of those individuals who may be selected as arbiters; ideally, the candidates will have previously written in the genre of the current film undergoing arbitration. As in voir dire, each arbitration party may peremptorily challenge a reasonable number of potential arbiters; unlike voir dire, no communication with the pool of potential decisionmakers occurs.[73] The remaining pool of potential arbiters enables the Credit Arbitration Secretary to select three arbiters, at least two of whom shall have been WGA members for two or more years and shall have served on a minimum of two credit arbitration committees during that time. The final arbiter may have similar experience or may be selected from the larger Guild membership, provided the individual has been a Guild member for five or more years or has received three screenplay credits.[74]

The selected arbiters shall remain anonymous to one another because the committee members perform their arbitary functions without inter-committee communication or deliberation. Under Guild policy, the identity of the arbiters is not disclosed to the participating writers seeking credit or to any other Guild member, with the exception of the Credit Arbitration

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[71] WGA MANUAL, *supra* note 44, at 7. *See also* Cox & Johnson, *supra* note 31, at 14.

[72] *See* WGA MANUAL, *supra* note 44, at 15.

[73] *See id.* at 5.

[74] *See id.*

Secretary and an appointed Credits Committee Consultant. The consultant, whose identity is similarly undisclosed, functions as an aid to the arbiters, providing necessary information on Guild "policy, rules, precedent and procedure."[75] Confidentiality considerations also allow any participating writer to request anonymity for all writers during the course of the arbitration, resulting in assignment of generic identification labels (Writer A, Writer B) determined by which writer preceded another chronologically in producing work on the project under consideration. Upon request, the title of the film may also remain undisclosed to the arbiters,[76] although in an industry in which the details of high-profile projects are rarely kept truly secret,[77] this latter grant of anonymity may arguably be regarded as more perfunctory symbolism than substantive protection.

The selected arbiters are then provided with the necessary material from which a credit determination can be made. Such material should have been previously examined by the participating writers seeking credit and may have been the subject of an earlier hearing to resolve disputes or confusion over the material.[78] The material includes: (1) the production company's tentative writing credits; (2) optional written statements by the participating writers, which may include illustrative comparisons between scripts and are not disclosed to the arbitration participants; (3) a statement of the issue to be resolved; (4) written material such as scripts and treatments from the production company by all writers whose work was used or might have been used by other subsequent writers, including source material and a chronological statement listing the material; (5) other relevant information requested by the WGA from the production company; (6) the WGA Screen Credits Manual; and (7) a request for telephonic

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[75] *Id.* Interpretation of the rules and procedures of the WGA credits arbitration process remains subject to revision as needed, as exemplified in the Credits Manual disclaimer that "[t]he Guild has discovered that there is no such thing as binding precedent. New conditions, new problems, new methods of work frequently require an alteration of the rules." *Id.* at 17.

[76] *See id.* at 5.

[77] Hollywood is notorious for its lack of secrecy:

> "Hollywood" is basically a very small community, and there are precious few secrets. When a studio gives a green light to a project, before casting or crew is completed, a lot of people know the project well: Remember that a majority of films have been turned down already by the majority of studios.

GOLDMAN, *supra* note 4, at 80–81.

[78] *See* WGA MANUAL, *supra* note 44, at 5; *see also* discussion *supra* Part III.B.

indication of the arbiter's decision, to be followed by written confirmation.[79]

The arbiters then proceed to evaluate the material independently and issue their decision. Here, the arbitration process is potentially subject more to the personal inclinations of the arbiters than to rigid governing rules; the Guild provides guidelines for awarding specific credits, but arbiter interpretation of the creative process is substantial, and to a large extent, unavoidable. One screenwriter who has been both arbiter and participating writer describes this stage as "like measuring smoke."[80]

The determination of credits is based upon a holistic interpretation of a screenwriter's percentage of contribution, with the type of credit to be awarded dictating what percentage a writer must have brought to the final script. However, the estimated percentage of contribution is not based upon volume of pages or lines contributed; the arbiters are instructed to consider a writer's impact upon "story, plot, structure, theme, characterization, atmosphere, dialogue and the tone of the script."[81] Alteration of every line of a script may not suffice if no substantive change has been made, while alteration of a single part of a script may so dramatically constitute significant contribution that credit will be awarded.[82] The number of writers who may receive credit and the types of credits that may be awarded are limited, the rationale being that "[f]ewer names and fewer types of credit enhance the value of all credits and the dignity of all writers."[83] The specific types of credit, despite their apparent clarity, may not be easily understood by a layperson, as they depend upon Guild-approved definitions.[84] For instance, the Screen Credits Manual explains

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[79] *See* WGA MANUAL, *supra* note 44, at 7. The written statement of a screenwriter who desires to have input into the determination must be submitted to the WGA within 24 hours of notification that the tentative credits are subject to protest. *See id.* at 6.

[80] Cox & Johnson, *supra* note 31, at 14. The screenwriter, Steven de Souza, echoes the WGA's description of the arbitration as "arduous and unpleasant," WGA MANUAL, *supra* note 44, at i, in his description: "It's a pain-in-the-ass job. Sometimes they come to your door with a wheelbarrow full of scripts. You presume that [the arbiters] do read them all." Cox & Johnson, *supra* note 31, at 14.

[81] Cox & Johnson, *supra* note 31, at 14; *see also* WGA MANUAL, *supra* note 44, at 12.

[82] *See* WGA MANUAL, *supra* note 44, at 12.

[83] *Id.* at 13.

[84] One arbiter has written that comprehension of the various credits' distinctions "is only a little simpler than following recent political events in Eastern Europe." de Souza, *supra* note 53, at M4.

that "[t]he term 'story' . . . has a specialized legal meaning. It refers only to writing that represents a contribution 'distinct from screenplay and consisting of basic narrative, idea, theme or outline indicating character development and action.'"[85] This differs from "source material" which is held to consist of "all material upon which the screenplay is based other than story" such as plays, novels or purchased stories and articles that provide a basis for the screenplay.[86]

In general, the "Screenplay by" credit may be given to no more than two individual writers, with the exceptions that (1) arbitration may allow for a third writer to be added under unique circumstances and (2) up to two writing teams, in which two writers work as a unit, may receive such "Screenplay by" credit.[87] The necessary percentage required for "Screenplay by" credit varies depending upon the origin of the script; an original script requires that a subsequent writer or writing team contribute fifty percent, whereas a script that was not developed from the original writer's own idea requires that a subsequent writer seeking credit must have contributed at least thirty-three percent to the screenplay.[88] Other credits define other types of contributions tied to the origins of the screenplay: "Written by" for when no source material exists and the writer or team is responsible for both story and screenplay;[89] "Story by" for when the writer has provided the story using no source material;[90] "Screen Story by"—awarded only through arbitration—for when a writer uses source material *only* to create "a substantially new and different story";[91] and the less favored "Adaptation by" credit for when, through arbitration, it is determined that a writer's contribution is significant in shaping a screenplay

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[85] WGA MANUAL, *supra* note 44, at 10.

[86] *Id.* at 11.

[87] *See id.*

[88] *See id.* at 12.

[89] *See id.* at 10.

[90] *See id.* This credit may grow especially complex when source material is indeed involved:

> When the screenplay is based upon source material whose acquisition is not covered by this Basic Agreement, screen credit for story authorship shall not be given in the form "Story by" but may be given by the Company to the source material author and may be worded "From a Story by" or "Based on a Story by" or other appropriate wording indicating the form in which it is acquired.

*Id.*

[91] *Id.* at 11.

without qualifying for the aforementioned "Screenplay by" credit.[92] Increased percentages and demands govern the award of writing credit to production executives.[93]

Upon weighing the requirements for each possible credit against every involved writer's estimated contributions, each arbiter will arrive at a statement of credits that he or she will communicate to the Credit Arbitration Secretary, first by telephone, then by letter. After receiving the written confirmation, the Secretary will notify the production company and participating writers of the majority-rules credits decision, moving the process into the final phase.[94]

### D. *Post-Arbitration Procedures*

Following the arbiters' credit determination, any participating writer may appeal to the WGA Policy Review Board, which consists of the Chair or Vice-Chair of the Credits Committee and two other Credits Committee members.[95] Appeal must be taken within twenty-four hours of notification of the arbitration decision, or the right to appeal is waived.[96] The function of the Policy Review Board is not to consider the merits of a participating writer's demand for credit; rather, the Board is solely concerned with determining "whether or not, in the course of the credit determination, there has been any serious deviation from the policy of the Guild or the procedure as set forth in [the Screen Credits] Manual."[97] The material considered by the arbiters will not be read, and the Board may not reverse a determination or award credits itself; it may only either direct reconsideration of the awarded credits by the original arbiters or call for a new committee of arbiters to render a decision. Such extraordinary relief will only be granted for a limited number of reasons:

> (a) Dereliction of duty on the part of the Arbitration Committee or any of its members; (b) The use of undue influence upon the Arbitration

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[92] *See id.* at 13.

[93] *See id.* at 13–14.

[94] *See id.* at 9.

[95] *See id.* at 8. The credit consultant who advised the arbitration committee being appealed may not serve on the Policy Review Board. *See id.*; *see also* YELDELL, *supra* note 19, at 14–18.

[96] *See* WGA MANUAL, *supra* note 44, at 8.

[97] *Id.* at 8. *See also* YELDELL, *supra* note 19, at 14–18.

> Committee or any of its members; (c) The misinterpretation, misapplication or violation of Guild policy; or (d) Important new written material, for valid reasons not previously available to the Arbitration Committee.[98]

Following either the first arbitration award of credits, if there is no appeal taken, or following an upheld post-appeal credit determination,

> [t]he decision of the Guild arbitration committee, and any Board of Review established by the Guild in connection therewith, with respect to writing credits, insofar as it is rendered within the limitations of . . . Schedule A, shall be final, and the [production] Company will accept and follow the designation of screen credits contained in such decision and all writers shall be bound thereby.[99]

The WGA collective bargaining agreement further addresses the issue of post-arbitration litigation:

> No writer or Company shall be entitled to collect damages or shall be entitled to injunctive relief as a result of any decision of the Committee with regard to credits. . . . [By signing a contract incorporating the contents of the collective bargaining agreement] any writer or Company specifically waives all rights or claims against the Guild and/or its arbiters or any of them under the laws of libel or slander or otherwise with regard to proceedings before the Guild arbitration committee . . . all such rights or claims are hereby specifically waived.[100]

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[98] WGA MANUAL, *supra* note 44, at 8; *see also* YELDELL, *supra* note 19, at 14–18.

[99] WGA MANUAL, *supra* note 44, at 9 (quoting 1988 WGA AGREEMENT, *supra* note 62, at 286).

[100] *Id.*

## IV. LEGAL CHALLENGES

### A. *State Challenge:* Ferguson v. Writers Guild of America, West, Inc.[101]

Following the success of the film *Beverly Hills Cop* starring actor Eddie Murphy, Paramount Picture Corporation sought to produce a sequel utilizing the same characters.[102] After rejecting the written efforts of other writers hired for the project,[103] Paramount retained screenwriter Larry Ferguson to draft the script for the motion picture's sequel, *Beverly Hills Cop II*.[104] Upon completion of the film, a credits arbitration was conducted and the WGA determined that Ferguson should receive co-credit with another screenwriter for the script itself, while story credit was awarded to Eddie Murphy and Robert D. Wachs.[105] In response to this award of credits, Ferguson requested that the matter be reviewed by the WGA Policy Review Board on April 27, 1987, stating in a letter through his attorney that "there was a misinterpretation, misapplication and/or violation of Guild Policy" in two specific ways.[106] First, Ferguson contended that awarding story credit to both Murphy and Wachs was impermissible, as they were production executives and were unable to receive such credit based upon their contributions and the relevant WGA Credits Manual provision governing producers receiving writing credit.[107] Ferguson also asserted that the other screenwriter awarded screenplay credit had failed to contribute the requisite thirty-three percent required for such an award.[108] The Policy Review Board rejected these contentions and upheld the credits determination.[109]

Ferguson subsequently filed suit in the California Superior Court on May 15, 1987, seeking a "peremptory writ of mandate requiring the Writers Guild to set aside its credit determination and make a new

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[101] 277 Cal. Rptr. 450 (Cal. Ct. App. 1991).

[102] *See Ferguson*, 277 Cal. Rptr. at 451.

[103] *See id.* at 453–454.

[104] *See id.* at 451.

[105] *See id.*

[106] *Id.* at 454–455.

[107] *See id.*

[108] *See id.* For a discussion of the percentages required for the "Screenplay by" writing credit, see *supra* notes 87–88 and accompanying text.

[109] *See Ferguson*, 277 Cal. Rptr. at 454.

determination giving Ferguson sole screenplay credit and sole story credit."[110] Included with his petition, Ferguson provided all screenplay and story materials so that the court could ascertain credit allocation under WGA standards.[111] On November 20, 1987, the court denied the petition and thereafter denied a motion for reconsideration on December 22 of that same year.[112]

Ferguson appealed,[113] again providing the court with the relevant screenwriting material, seeking a judicial determination of credit in his favor.[114] In the alternative, Ferguson requested the court to order that a new credits determination be made by the WGA due to a number of alleged procedural defects credited to the first arbitration.[115] Finally, Ferguson claimed that the superior court had erroneously denied his requests to depose the other screenwriter awarded shared screenplay credit and to

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[110] *Id.* at 451.

[111] *See id.* at 453.

[112] *See id.* at 451.

[113] Interestingly, three days before oral argument was set to commence, Ferguson sought to dismiss his appeal. However, the request to dismiss was denied by the court, which noted that the "issues [involved] are both substantial and recurring" and that the appeal had been pending for three years with Ferguson's dispute with the WGA still unresolved. *Id.*

[114] *See id.* at 453.

[115] *See id.* at 453–454. Associate Justice Klein summarized Ferguson's alleged seven defects:

> (1) the Credit Arbitration Secretary improperly cast herself in the role of consultant to the arbitration committee and had improper substantive communications with the three arbitrators; (2) Ferguson was unfairly denied a postponement of the arbitration to assemble additional story materials and prepare his confidential statement for the arbitrators; (3) the arbitrators were given insufficient time to review the materials Ferguson submitted; (4) the Writers Guild took no steps to ensure the three arbitrators were disinterested and unbiased; (5) the arbitrators were not provided with copies of Schedule A or the Credits Manual; (6) the Writers Guild incorrectly treated as story material a memorandum in which Paramount executive David Kirkpatrick recounted a story idea told to him orally by Murphy and Wachs; and (7) the Writers Guild improperly denied Ferguson's request that the arbitrators be given a second memorandum in which Paramount executive Michael Roberts remarked that Paramount "threw out" the screenplay drafted by the writers it has previously engaged and hired Ferguson "to write an entirely new draft."

*Id.*

compel discovery of the names of the three WGA arbiters, whom Ferguson also apparently wished to depose.[116]

The court affirmed the decision of the superior court, stating that although a judge is arguably "as capable as any lay person" in determining credits, it nonetheless agreed:

> [W]ith the Writers Guild's position that under Schedule A and the Credits Manual, disputes over writing credits for feature-length photoplays are nonjusticiable. . . . [The WGA membership] have agreed among themselves (by approving the Credits Manual) and with the producer's association (by entering into Schedule A of the Basic Agreement) that this delicate task is to be performed by arbitration committees composed of experienced Writers Guild members.[117]

These members, the court stated, could resolve credit disputes "both more skillfully, more expeditiously, and more economically" than the courts, avoiding the need to undertake "ruinously expensive litigation."[118]

Further, the scope of judicial review was held to be limited to determining only whether the terms of the WGA Credits Manual had been violated by a material and prejudicial breach from the approved procedures.[119] Such restricted review, the court commented, echoed the scope of judicial review given to more traditional forms of arbitration, where courts have expressly declined to adjudicate the merits of an arbitration award, instead focusing on (1) whether the parties had agreed to arbitration, (2) whether the objecting party had a fair opportunity to be heard under the arbitration procedures utilized and (3) whether the arbiters exceeded their authority.[120]

Applying this limited scope of review, the court found no material breach of the Credits Manual, citing "considerable deference" to the WGA Policy Review Board's approval of the credit determination due to its members' "expertise in the interpretation and application of Schedule A and the Credits Manual."[121] The court also noted that because Ferguson presented only two alleged breaches of proper procedure before the Board, the screenwriter thereby failed to preserve for judicial review his seven

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[116] *See id.* at 454.

[117] *Id.*

[118] *Id.*

[119] *See id.*

[120] *See id.* (citations omitted).

[121] *Id.*

contended violations.[122] Such lack of preservation was derived from "the familiar principle of exhaustion of administrative remedies [which] prevents a litigant from pursuing a judicial remedy for procedural defects without having first asked the private organization to correct them."[123] Even if Ferguson had successfully preserved his contentions, however, the court suggested in passing that the record failed to present sufficient convincing support and that it would find the asserted claims to be without merit.[124]

Finally, the court rejected Ferguson's claim that the identities of the arbiters should have been disclosed, in addition to declining to accept interrogation of the arbiters and the other screenwriter awarded co-credit with Ferguson. The court expressed doubt that obtaining the other screenwriter's appraisal of both his and Ferguson's contributions to the script would reveal anything, because the writer had not offered to concede credit in the prior WGA arbitration.[125] Disclosure of the identity of the arbiters was similarly impermissible, the court reasoned, due to both the Credits Manual's specific provision that the three arbiters remain anonymous to one another, and to the Guild's long-standing policy—not expressly stated in the Manual—that no arbitration party or other Guild member could learn the arbiters' identities.[126] Although the court noted the

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[122] *See id.* at 455. For the court's summation of Ferguson's claimed procedural indiscretions, see *supra* note 115.

[123] *Id.* at 454 (citing Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 474–477 (1976)).

[124] *See id.* at 455.

[125] *See id.*

[126] *See id.* at 455. The holding that the names of the arbiters should not be disclosed contrasts with the earlier state court decision found in *Writers Guild of America, West, Inc. v. Superior Court*, 245 Cal. Rptr. 827 (1988). Screenwriter Gore Vidal challenged a WGA credit arbitration in which he was not awarded credit on the motion picture *The Sicilian*. Dispute arose over the WGA's refusal to answer interrogatories presented by Vidal seeking the identities of the arbiters. *See id.* at 828–830. The trial court initially rejected Vidal's motion to compel disclosure, stating that, while the court did not accept the WGA's position that federal law governed the issue, the court nonetheless was not inclined "[t]o permit one dissatisfied writer to attack a system he has agreed to be bound by." *Id.* at 830.

Upon Vidal's motion for reconsideration, the trial court granted the motion to compel discovery of the arbiters' identities after the court learned that the arbitration rules governing this issue were not written, but were simply the custom that had been followed. The court passed on answering the Guild's motion for reconsideration, stating that it believed that the issue was one to be decided more properly by the court of appeals. *See id.* The appellate court noted that the issue was "essentially 'a policy

unusual nature of the WGA credits arbitration procedure, it nonetheless upheld nondisclosure of the arbiters' identities and affirmed the lower court, rejecting Ferguson's claims in providing state judicial vindication of the controversial arbitration process.[127]

## B. *Federal Challenge:* Marino v. Writers Guild of America, East, Inc.[128]

After co-writing a treatment for a second sequel to the motion picture *The Godfather*, screenwriter Nick Marino was hired in 1985 by Paramount Pictures Corporation to draft the subsequent screenplay for the film. Ultimately, the script went unproduced by the studio. Two years later, Marino completed a second treatment, which he then submitted to *Godfather* director Francis Ford Coppola's production company; the

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decision'" involving balancing Vidal's discovery interests against the arbiters' confidentiality interests. *See id.* at 835. After acknowledging the difficulty in somehow restricting the scope of disclosure, the court explained:

> It is clear that what threatens the privacy interests of the arbitrators is not so much disclosure to the general public as disclosure to those in the entertainment industry who hire writers. . . . undoubtedly the arbitrators' names will become a matter of public record. . . . When we balance the risk of harm to the arbitrators from public disclosure, which harm at this point is somewhat speculative, with the very real risk to Vidal that he will not be able to continue with his lawsuit, the scales tip in favor of disclosure.

*Id.* Interestingly, Vidal's suit was settled, and on April 5, 1988, the WGA filed a notice of settlement and sought to withdraw its appeal a week prior to the court of appeals affirming the compelled disclosure. The court nevertheless rendered its decision on April 12, 1988. *See* Recent Cases, ENT. L. REP., May 1988, at 3, 5.

[127] *See Ferguson*, 277 Cal. Rptr. at 455. The court explained that:

> While it is unusual to have an arbitration procedure in which the parties cannot appear in person before the arbitrators and cannot learn the arbitrators' identities, discovery of the names of the arbitrators in a Writers Guild credit arbitration could serve no legitimate function. . . . Even when an arbitration is conducted under more familiar rules, though, . . . the losing party is not permitted to conduct an inquisition into the arbitrators' thought processes in reaching their award.

*Id.* (citing Cobler v. Stanley, Barber, Southard, Brown & Assocs., 217 Cal. App. 3d 518, 528-529 (1990)).

[128] 992 F.2d 1480 (9th Cir. 1993), *cert. denied*, 510 U.S. 978 (1993).

unsolicited text was not purchased. Coppola, along with writer Mario Puzo, co-wrote a screenplay for the film in 1989-90, which was produced as *The Godfather III*.[129]

Upon completion of the film, Paramount submitted to the WGA and to the writers involved with the project a list of tentative credits awarding shared writing credit to both Coppola and Puzo.[130] As required in the collective bargaining agreement, a WGA credits determination was automatically conducted due to the proposed award of writing credit to director and production executive Coppola.[131] Although several writers were involved in the project to varying degrees and submitted material to the WGA arbitration committee, only three individuals sought recognition of credit in the arbitration proceeding: Marino, Coppola and Puzo.[132] Following arbitration, only Coppola and Puzo received writing credit. Marino contested the decision to the Policy Review Board, which uncovered in its investigations that one of the three arbiters had not read the original 1985 treatment which Marino had co-written. The arbiter was sent the treatment and subsequently upheld the earlier credit determination. Marino was informed that the credit determination was binding and that no new Guild arbitration would be commenced.[133]

Marino then filed suit against the Writers Guild to obtain vacatur of the credit determination and to obtain declaratory relief.[134] Both parties moved for summary judgment. In granting summary judgment for the Writers Guild, the district court explained that "[a]n arbitration award may be vacated if a union breached its duty of fair representation in connection with the arbitration proceeding . . . or if the proceedings which culminated in the award were not fundamentally fair."[135] Such fundamental fairness, the court noted, entailed meeting three basic minimal requirements: "adequate notice, a hearing on the evidence, and an impartial decision by

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[129] *See Marino*, 992 F.2d at 1482.

[130] *See* Marino v. WGA, West, Inc., No. CV 91-110-WJR(SX), 1991 WL 519583, at *2 (C.D. Cal. Oct. 30, 1991).

[131] *See id.* at *2.

[132] *See Marino*, 992 F.2d at 1482 n.2.

[133] *See id.* at 1483.

[134] Originally, suit was brought in California state court. The Writers Guild successfully had the suit removed to federal court, asserting that the claim was governed by the WGA Minimum Basic Agreement and preempted by federal labor law. *See Marino*, 1991 WL 519583, at *3.

[135] *Id.*

the arbitrator."[136] Finding no evidence of arbitrary or discriminatory conduct, nor of any denial of fundamental fairness, the court upheld the arbitration.[137]

On subsequent appeal, the Ninth Circuit Court of Appeals reviewed the granting of summary judgment de novo, considering the numerous allegations of impropriety Marino alleged.[138] First, Marino challenged the allowance of anonymity for the arbiters, alleging that such concealment of identity also permitted possible concealment of bias, as well as a loss of opportunity to testify in person or cross witnesses before the arbitration committee. Further, Marino contended that he was denied the right to have all of the writers involved in the dispute remain anonymous, that relevant evidence was excluded from the proceedings, while improper evidence was considered and that he was precluded from review of the other screenwriters' submitted materials.[139]

Extolling the virtues of arbitration, the court began its analysis noting that "[a]rbitration is a favored method for the resolution of disputes . . . [and] because arbitration is contractual, rather than imposed by law, what we have come to see as the hallmarks of judicial justice are not necessarily required in arbitral justice."[140] A benefit of arbitration, the court continued, is its ability to "supply high-powered expertise to a particular and narrow area—such as deciding who should get credit for creating an imaginative work" while potentially allowing the arbiters to avoid the inherent pressures and biases placed upon them.[141] Undue judicial interference, then, would only lessen the potential effectiveness which arbitration could afford.

Approaching the issues with such judicial inclination, the court explained that "it is well settled that a party may not sit idle through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turned out to be adverse."[142] This rule was regarded as applicable to objections concerning the adequacy or type of arbitration procedures utilized, the fairness of the

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[136] *Id.*

[137] *See id.* at *4.

[138] *See Marino*, 992 F.2d at 1483 (citing Kruso v. Int'l Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990)).

[139] *See Marino*, 992 F.2d at 1483.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 1484.

arbitration and the duty of fair representation a union owes to its members. Citing *Ferguson*, the court, cognizant of the "important and legitimate" considerations necessitating arbiter anonymity,[143] reviewed how reasonable precautions had been taken to ferret out bias, given the unique circumstances of the industry.[144] Likening Marino's arguments against anonymity to claims of arbiter bias, the court adjudged the claims to be waived due to Marino's failure to raise his contentions prior to the WGA arbitration. While the court recognized the possibility of encountering a system so per se unfair that no prior objections need be made prior to seeking judicial resolution, and that not every procedural defect would always be waived if a timely objection was not made, the court found the instant matter to fall within the scope of waiver through lack of prior objection.[145] Thus, Marino's claims concerning anonymity failed, including his allegation of error that he has been prevented from learning the identity of the arbiters during discovery. The court, repeating its finding of a waiver, held the arbiters' identities irrelevant to Marino's case.[146]

Similarly unsuccessful was Marino's allegation that the union had violated its duty of fair representation. Applying a two-pronged test, the court looked at (1) if the union's "misconduct" alleged by Marino involved the union's judgment or was procedural in nature and (2) if the conduct was held to be procedural in nature, whether the conduct was "arbitrary,

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[143] *Id.* (quoting Ferguson v. Writers Guild of America, West, Inc., 277 Cal. Rptr. 450 (Cal. Ct. App. 1991)). Regarding the anonymity of the arbiters as "the heartland of the arbitration procedure," *id.* at 1485, the appellate court recognized the inherent balancing involved in expanding the openness of the arbitration procedure against the practical considerations weighing upon the livelihoods of those willing to function as arbitrators:

> Very important people may be unhappy with a decision and may be in good position to pressure or take revenge against the arbiters. . . . The heavy responsibility of the arbiter's mantle might well be declined by hard-working writers if they knew that they could be hauled through recriminatory judicial proceedings, accused of bias, and the like.

*Id.* at 1484.

[144] *See Marino*, 992 F.2d at 1484. Marino had made no previous formal objection to the arbiter selection procedures and in fact had joined another writer in striking 85 individuals from the list of potential arbiters. The Guild arbitration coordinator had also screened all potential arbiters for bias. *See id.*

[145] *See id.* at 1483–1485.

[146] *See id.* at 1488.

discriminatory, or in bad faith."[147] If the court determined that the alleged conduct fell under the union's exercise of judgment, Marino could only prevail if the conduct was shown to be discriminatory or in bad faith, a stricter standard than if the conduct were procedural in nature.[148] Noting that arbitrary conduct against Marino could not be simply negligence, but rather had to constitute a showing of reckless disregard for Marino's rights, the court disposed of each claim Marino asserted as failing to comprise such reckless conduct.[149]

First, Marino attacked the entire arbitration procedure as fundamentally unfair. The court felt that this was, in part, another assertion of the waived anonymity issue, and that Marino's additional complaint of being prevented from reviewing the statements of the other arbitration participants failed to constitute fundamental unfairness. Given the time constraints involved, and the fact that the statements of the writers were not regarded as substantive evidence but only opinion, the court found no inherent unfairness, although in passing it was noted that the confidentiality of the statements involved was not wholly necessary, because replies to the statements could simply be discouraged or altogether denied.[150] Marino also asserted that his request to keep the identity of the writers involved anonymous was rejected by the arbitration coordinator despite existing as a right under the terms of the Credits Manual. This claimed procedural violation was presented to the WGA Policy Review Board, which had concluded that no such demand had been made; in fact, Marino included his name in his statement to the arbitration committee. This exercise of judgment was held to be within reason by the court, which stated that even if a factual dispute over the demand existed, it did not indicate arbitrary, discriminatory or bad faith conduct by the union.[151]

Marino further claimed that the committee's failure to consider his 1987 treatment was indicative of misconduct constituting a breach of fair representation. However, the treatment was not purchased by a Guild signatory, was not written while Marino was under employment to a Guild

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[147] *Id.* at 1486.

[148] *See id.* (quoting Burkevich v. Air Line Pilots Ass'n, Int'l, 894 F.2d 346, 349 (9th Cir. 1990)).

[149] *See Marino*, 992 F.2d at 1486–1488.

[150] *See id.* at 1486. During discovery, the court noted, Marino had obtained copies of the other writers' statements and had failed to assert that they indicated any breach of fair representation. *See id.*

[151] *See id.* at 1486–1487.

signatory and was therefore adjudged by the Guild to be outside WGA jurisdiction. This jurisdictional decision was neither shown to be a recent alteration of the WGA's scope of jurisdiction nor proven to have been made with the intention of damaging Marino's claim of credit. The decision was not held to constitute a breach of duty.[152] Finally, Marino argued that the committee had not reviewed all material submitted to them, while improperly reviewing material such as the previous films in the trilogy and the novel which spawned the series. Both claims failed, as the court found nothing constituting bad faith or discrimination in the WGA's acceptance of the arbiters' focus, which emphasized some material to a greater extent than other work.[153]

In concluding, the court reflected on the unusual nature of the process which the WGA had constructed after winning the right to determine credits:

> The need for speed is part of the right [the WGA] negotiated for on behalf of its members. That need drives the whole process; in the absence of quick determinations, it is likely that the right itself would whither away. . . . Although the three-phase arbitration procedure is not the same as the more deliberate judicial procedures that we are accustomed to, this case helps show why it cannot be.[154]

Noting that *The Godfather III* had been released over three years prior, the court continued: "Our procedures require time; other needs demand other procedures. . . . [in this case] we cannot say that the procedures designed for speed overwhelmed the ideal of justice."[155]

## C. *The Legacy of* Ferguson *and* Marino

The impact of *Ferguson* and *Marino* is uncertain, despite the passage of several years since their final dispositions. Certainly, *Ferguson* provides state court recognition of the validity of the WGA credits arbitration procedures, while *Marino* stands for similar recognition on the federal

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[152] *See id.* at 1487.

[153] *See id.* The court noted that the Credits Manual provided for the review of source material—the previous motion pictures and the novel—and that Marino had included such references in his written statement to the arbiters. *See id.*

[154] *Marino*, 992 F.2d at 1488.

[155] *Id.*

level. The resulting precedent may well have a chilling effect on screenwriters' enthusiasm for challenging the arbitration procedures in the forum of the court; this may perhaps be occurring on the federal level already.[156] Beyond the film industry, the legacy of both cases is arguably more theoretical than concrete. To date, few cases have cited *Marino*, which itself is the sole case to have cited *Ferguson*. In *English v. Burlington Northern Railroad Co.*,[157] the court affirmed the Public Law Board's upholding a railroad worker's discharge by the railroad for off-duty misconduct. While discussing a possible claim against the union representing the discharged employee, English, at the Board hearing, the court cited *Marino* as standing for the proposition that in establishing a breach of duty of fair representation, a union member must show arbitrary, discriminatory or bad faith conduct on the part of the union toward the member.[158] However, English had brought his claim against the Board, thus relegating *Marino* to an extraneous aside. Similarly, in *Babcock & Wilcox Co. v. PMAC, Ltd.*,[159] the court disposed of a claim of arbiter bias by citing *Marino* for support that a party cannot collaterally attack an arbitration on grounds that the complaining party failed to raise before the arbiter prior to the arbitration procedure.[160]

*Marino*, however, has enjoyed some perhaps more significant attention in theoretical circles. One commentator has routinely cited *Marino* as an example of judicial acceptance of "even novel systems of arbitration," potentially opening the door for innovative, need-specific forms of arbitration which would bar federal court litigation as part of a continuing "revisionary interpretation of the scope of arbitration."[161] Another commentator has suggested implementing a similar system of credit allocation within the setting of academia. Such a system would enable universities to determine proper credit allocation for faculty contributions to

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[156] *See* discussion *infra* note 200.

[157] 18 F.3d 741 (9th Cir. 1994).

[158] *See Burlington*, 18 F.3d at 745.

[159] 863 S.W.2d 225 (Tex. App. 1993).

[160] *See Babcock & Wilcox*, 863 S.W.2d at 232.

[161] Joseph Z. Fleming, *Analysis of Humanitarian Rights Laws Affecting Hours, Wages, Working Environment in the Airline and Railroad Industries—Suggested Procedures for Consolidating Dispute Resolution*, SA31 ALI-ABA 927, 957-959 (1996); *see also* Joseph Z. Fleming, *Grievances and Arbitration for the Organized Employer*, CA41 ALI-ABA 301, 338-339 (1995).

composite works in which the university claimed ownership.[162] Other possibilities exist; it is not unreasonable to imagine a similar system of dispute resolution employed within the context of attorney-client disputes, with bar associations providing attorneys willing to serve anonymously, rendering decisions on fee disputes between parties whose identities are concealed.[163] It is also realistic to explore implementing a similar system to handle charges of false political campaign advertising, where fast resolution of disputes would serve the social utility by ideally limiting public consumption of misstatements which could affect election results. In such cases, waiting until the court or other decisionmaking body can provide an answer may result in eventual vindication, but would not provide employment. Further, the need for anonymity may be derived from the inherent discomfort the arbiters would face in rendering decisions concerning public figures who may currently hold or subsequently attain influential positions where retribution would be possible, however unseemly.[164] However, for the most part, the legacy of *Ferguson, Marino* and the credits arbitration process remains unwritten, with the possible implications from judicial endorsement of such a departure from the traditional model of arbitration yet unknown.

## V. THE CREDITS DETERMINATION PROCESS AND TRADITIONAL ARBITRATION

The specialized nature of credits determination invariably leads to dispute over both the arbitration procedures used in the WGA process and in the rules defining types of credits used by the arbiters. Given the inherent difficulty in measuring creative contributions through designated percentages, the fact that disputes arise is unremarkable. Setting aside for the moment issues concerning what the guidelines should be for quantifying

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[162] *See* Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 640 n.178 (1987).

[163] Many bar associations already offer fee dispute resolution programs patterned after traditional arbitration.

[164] *See, e.g., In re* Complaint Against Harper, 77 Ohio St. 3d 211 (1996). In *Harper*, dispute arose over a campaign commercial aired in the 1994 Ohio Supreme Court election. The eventual reprimand given to one of the parties for violating Canons of the Code of Judicial Ethics was delivered two years after the actual election, potentially risking a much-delayed, moot "victory" had the target of the advertisement been defeated by the offending party.

creative contributions, consideration must be paid to the methods employed to implement these guidelines. The issue is whether the credits arbitration process is not only effective in resolving disputes quickly, but effective as well in meeting the theoretical basis underlying more traditional methods of arbitration.

In the traditional model of arbitration, following a demand for arbitration, the parties involved will work together to select an arbiter who will then meet with the parties to establish the issues, determine discovery limits and create an arbitration schedule.[165] The actual arbitration hearing proceeds not unlike a trial; both sides will present their argument to the arbiter with opportunity for cross-examination, and after closing arguments the arbiter will render a decision after appropriate deliberation.[166]

While such procedures at face value generally appear to mirror litigation, there are notable differences. As compared to litigation, arbitration offers parties a number of distinct powers and responsibilities:

> First, [arbitration] is private. . . . Second, the parties select their own decision-maker. . . . They also may employ a panel of arbitrators rather than a single arbitrator.
>
> Third, the parties . . . can control such details as how arbitration will be invoked, whether the arbitrator's award will be advisory or binding, whether witnesses will be called and placed under oath, whether briefs will be submitted, and whether the record will remain open after the hearing for receipt of new evidence. . . .
>
> Fourth, arbitration gives the parties the option of selecting the standards the arbitrator will use in resolving a dispute. . . .
>
> Finally, the parties pay all the costs associated with voluntary arbitration, including the arbitrator's fee and any other expenses. The taxpaying public bears none of the costs.[167]

The putative advantages and disadvantages of arbitration have been well documented, despite remaining relatively unmeasured.[168] Perhaps the most commonly cited advantage is that arbitration provides resolution of disputes more efficiently than courts can—defining efficiency here as

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[165] *See* MARGARET C. JASPER, THE LAW OF DISPUTE RESOLUTION: ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION 10 (1995).

[166] *See id.*

[167] SUSAN M. LEESON & BRYAN M. JOHNSTON, ENDING IT: DISPUTE RESOLUTION IN AMERICA 47 (1988).

[168] *See* 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 3.1, at 3:3.

constituting fast resolution with low financial outlay[169]—and in this respect, the WGA arbitration system is not found wanting. Commentators generally agree that arbitration is traditionally quicker at producing a decision as compared to litigation, although such speed may be lost depending on procedures and party conduct.[170] The credits arbitration process is clearly quick. From initial dispute to final determination of credits, the arbitration may take no more than twenty-one business days.[171] In contrast, the *Marino* court noted that three years had elapsed from the release of *The Godfather III* to that court's consideration of the credit dispute.[172] Should a film remain unreleased pending judicial disposition, such a lapse of time would unquestionably pose serious problems to the principals involved in the making of the film, with potentially disastrous consequences.[173]

Further, in comparison to the monetary costs associated with prolonged litigation, arbitration is regarded as generally less expensive. However, under a traditional model of arbitration, financial outlays may quickly accumulate as costs are contingent upon a variety of factors: the extent of discovery allowed, the possibility of litigation over arbitrability or an arbiter's award, the varying involvement of attorneys and compensation to the arbiter or to the administering arbitration institution involved (or even to both).[174] Again, the Guild procedures are relatively cost-effective for participating writers due to the absence of several possibly resource-draining elements: there is no discovery, the Guild assumes the cost of the actual arbitration and the involvement of counsel is presumably minimal in the typical credits arbitration.

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[169] *See id.* § 3.2.2, at 3:9–3:10.

[170] *See id.* § 3.2.2.1, at 3:11–3:12.

[171] *See supra* note 68 and accompanying text.

[172] *See supra* note 155 and accompanying text.

[173] See the discussion of the economic realities of the film industry, *supra* Part II.

[174] *See* 1 MACNEIL ET AL., *supra* note 168, § 3.2.2.2, at 3:12–3:13. Other costs aside from financial expenditures exist. *See id.* at 3:12 n.34. In the context of determining screenwriting credits, arbitration may arguably contribute in part to many writers' sense of powerlessness. Perhaps "having one's day in court" would provide many screenwriters with a sense that justice has been pursued more vigorously, given the trappings of the judicial system, in contrast to the anonymous "hidden" work of the WGA arbiters, where the stature of the arbiters is less symbolic than that of a judge, given that the arbiter is another screenwriter not unlike the participating writers. Such speculation, if correct, would increase the intangible costs the screenwriter pays through arbitration.

A second advantage derived from traditional arbitration is its inherent privacy. While litigation proceedings "are generally open to anyone wishing to walk into a courtroom or examine court records," traditional arbitration models allow parties to "exclude strangers from the hearing and, unless requested by either of them, neither records nor transcripts of the hearings are maintained. Nor do arbitrators generally write opinions."[175] Guild arbitration provides participating writers a greater degree of privacy than litigation, and, in some respects, grants further privacy than even more traditional models of arbitration. In credits arbitration, there is no face-to-face encounter with the arbiters. The identity of the participating writers, the name of the script and the contents of the writers' arguments are not revealed to anyone save the panel of arbiters and its consultant, and identification of the authors and film may be withheld even from the arbiters by special request.[176]

However, the privacy afforded the arbiters themselves may arguably diminish accountability, thereby increasing the potential for ill-decided credit allocations. Critics argue that true accountability for dereliction of duty is lost due to arbiter anonymity;[177] concerns have been raised that, while the arbiters are supposed to read all of the material submitted as part of the arbitration, not all arbiters do.[178] Proponents of the credits arbitration justify anonymity by pointing to the necessity to protect the arbiters from retribution by displeased arbitration participants; there is the risk that "[s]ince Hollywood is a town not known for its tenderness, few writers would judge an arbitration without the guarantee of anonymity."[179] The courts have recognized this fact, and in both *Ferguson* and *Marino* the element of possible retribution played a role in the courts upholding arbiter

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[175] *Id.* § 3:13.

[176] *See supra* notes 76–77 and accompanying text.

[177] *See* Robert W. Welkos, *'Cable,' 'Rock' in Disputes on Writing Credits*, L.A. TIMES, May 21, 1996, F1, at F6. One attorney representing a displeased screenwriter described the arbitration system: "Very little is revealed in the process. . . . The names of the arbitrators are not revealed. The final opinions of the arbitrators are not revealed. The statements other writers supplied to the arbitrators are not revealed. Everything is directed toward preventing accountability, scrutiny and review rather than the contrary." *Id.*

[178] *See* Cox & Johnson, *supra* note 31, at 14.

[179] Eisele, *supra* note 58, at F3.

anonymity.[180] Notably, the practice of arbiter anonymity was not included in possible changes suggested in the Guild's 1995 referendum on the credits arbitration process; rather, the proposed alterations focused on the substantive rules designed to guide the arbiter's decisionmaking[181]—perhaps indicating a general consensus that such anonymity, despite being one of the more prominent departures from traditional arbitration models, is nonetheless a necessity.[182]

Another advantage attributed to traditional arbitration models is that the process "may offer a less hostile atmosphere for resolving disputes than does litigation."[183] The level of hostility is contingent upon a number of variables, with possible explanations for decreased hostility arising from "[t]he very fact that each party [had] chosen the method of resolving the dispute, that each had a role in choosing their judge, the lesser formality of arbitration, and perhaps even the privacy of the proceedings . . . ."[184]

The Guild procedure arguably fails to mirror the majority of these components, instead presenting participants with a panel of unknown arbiters and a relatively formal process in which the writers may feel subject to the predilections and whims of individuals who remain beyond any degree of substantial accountability. However, the greater privacy—even secrecy—afforded the participants, the expedited length of the resolution procedure and the lack of real interaction with opposing parties may afford decreased hostility as compared to the level to be found in litigation or even traditional arbitration models. Arbitration of any sort "is essentially adversarial [in nature]. . . . The necessary factors for relative harmony may . . . be absent or have little effect, and it is unlikely that very

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[180] *See supra* notes 126–127, 143 and accompanying text. For the Vidal court, however, the threat of retribution remained too speculative to warrant arbiter anonymity. *See supra* note 126.

[181] *See* Eisele, *supra* note 58, at F3. In 1995, the WGA membership voted on a 169-page compilation of revised screen and television credits manuals. The proposed manuals, which would have enlarged the number of writers who could receive screen credit, were rejected by the membership by a vote of 82% to 18%. *See* Ted Johnson, *WGA Vote Demands Credit Issue Rewrite*, VARIETY, Nov. 6, 1995, at 7.

[182] The need for anonymity to guard against retribution precludes consideration of other alternative dispute resolution techniques involving face-to-face encounters, such as mediation or med-arb. While a variation of either technique might be possible to implement, perhaps using written communications between the parties and the arbiters, such a system would in all probability be unwieldy and sacrifice the advantage of speed.

[183] 1 MACNEIL ET AL., *supra* note 168, § 3.2.4, at 3:14.

[184] *Id.*

many experienced arbitrators have not seen hostility in arbitration the full equivalent of heated combat in the courtroom."[185]

The mere possibility of decreased hostility remains an attractive feature of traditional arbitration models, especially where parties do not desire to alienate the opposing side. Indeed, "[w]here the relationship will or is likely to continue during and following resolution of the particular dispute, reducing hostility may become a major goal."[186] This goal helps drive the screenwriting credits determination process. Perhaps the most significant contributions toward minimizing hostility that credits arbitration provides are brevity and anonymity; protracted disputes can generate considerable bitterness and cost, while the Guild procedure inherently provides fast resolution and a convenient scapegoat in the panel of arbiters, to whom negative feelings can be transferred safely without the capacity for actual confrontation. As noted, the film industry is a relatively closely intertwined business where personal relationships are of paramount importance and the ability to emerge from disputes with little acrimony engendered is invaluable.[187] The credit procedure's considerable strength, then, lies in its emphasis on preserving relationships among all of the involved parties while providing fast dispute resolution.

For at least one party, arbitration may also provide substantive and tactical advantages.[188] Where there is an imbalance in power relations between parties, the weaker side may benefit from arbitration;[189] such opportunity may exist in the nontraditional Guild credits arbitration process in the allowance for nondisclosure of the identities of participating writers. Such nondisclosure arguably affords a less-powerful writer a greater degree of equality in vying for credits against a more prominent writer. However, as noted, in an industry in which high-profile assignments and projects are rarely kept secret, there is the ongoing problem that the arbiters will have knowledge of who worked on a film, and may even be able to detect a screenwriter's distinctive style.[190]

Finally, another advantage of arbitration is that it offers the opportunity for disputes to be heard by experts in a particular field; the rationale behind this possible advantage is that "[a]n experienced arbitrator who is an expert

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185 *Id.*

186 *Id.*

187 *See supra* notes 28–29 and accompanying text.

188 *See* 1 MACNEIL ET AL., *supra* note 168, § 3.2.5, at 3:15.

189 *See id.*

190 *See supra* note 77 and accompanying text.

in the area of dispute may be more likely to decide the factual and legal questions more fairly than a judge lacking such expertise. The arbitrator's expertise, especially in technical fields . . . may often offer a great advantage to both parties."[191] The courts have acknowledged this supposition.[192] Supporting this theory is the notion that a screenwriter of at least some level of accomplishment is a screenwriter capable of being a good reader, able to effectively evaluate writing contributions.[193] No known empirical data supports this writer-reader assertion, although the rationale that a screenwriter would naturally be one of the more capable arbiters with possibly the best understanding of what is involved in creating a screenplay is arguably self-supporting.[194]

Assuming then that the credits arbitration process provides the majority of the essential strengths of arbitration, mention must be made of critical evaluations of the rules employed within the procedures to guide the arbiters in reaching a decision. As noted, there has been substantial debate among the WGA membership over the number of writers who may receive

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[191] 1 MACNEIL ET AL., *supra* note 168, § 3.2.6.2, at 3:17. However, some concerns do exist over replacing neutral judges with experts:

> Although an expert is more likely to introduce preconceived ideas and strong professional opinions than would a judge of more general experience, party control over selection may reduce such dangers, as may the use of neutral arbitrators on a tripartite panel. Moreover, no systematic empirical evidence supports the hypothesis that expert arbitrators are in fact more partial in decisionmaking than are judges.

*Id.* (citation omitted). Under the WGA procedures, the arbiter selection process arguably weakens a participating writer's ability to ferret out professionals with potentially undesirable preconceptions. However, the three-member arbiter panel helps offset this weakness.

[192] *See supra* notes 117–118, 141 and accompanying text.

[193] As previously noted, an arbiter must be a Guild member, meaning that he or she has acknowledged script credits. Script credits are earned by being employed as a writer, even if the written work has not been produced or the writer has not received actual screen credit for his or her work. *See supra* note 74 and accompanying text.

[194] The fact that an expert or a panel of experts conducts the arbitration does not necessarily mean that any greater degree of justice will be achieved. It has been noted that, even limiting the definition of justice to process, the process adopted may, from a larger public perspective, be viewed as unjust. Also, the use of experts sacrifices "broader perspectives of generalists like judges and juries." 1 MACNEIL ET AL., *supra* note 168, § 3.2.6.3, at 3:20.

credit and what level of contribution of work they must meet.[195] The merits of the requirements the WGA has chosen to use are beyond the scope of the current discussion, although it should be noted that one of the rationales behind choosing arbitration to resolve disputes is that parties are afforded the opportunity to select the standards the arbiter shall apply.[196] In this case, the Guild membership has voted to retain the current variety of credits and their requirements.[197]

The debate over what guidelines should be employed in determining screen credits continues unabated, as does opposition to the Guild's non-traditional arbitration process. Both areas are imperfect, but neither can be held to wholly disregard the pursuit of justice in resolving credit disputes. While nontraditional, the WGA system cannot be casually dismissed as ineffective or unjust:

> [A]rbitration cannot be divorced from the context within which it occurs. The nature and role for arbitration depends, in part, upon the characteristics of the system of social relationships in which it takes place. Thus, the practice and effectiveness of arbitration in the trade or industry from which the dispute arose will have influence on the effectiveness of arbitration in disputes between parties from that trade or industry.[198]

## VI. CONCLUSION

The Writers Guild of America's credit arbitration process is a potentially flawed mechanism in which the pursuit of fast resolution of disputes and preservation of anonymity may at times lessen the degree of justice achieved. Yet, the need for such speed is apparent and essential; delay in releasing a film while credit deliberations wind their way through the judicial process could prove disastrous. Film genres and stars fall in and out of vogue; similar projects race to reach the screen the earliest, hoping to capture the hearts, minds and wallets of the moviegoing audience first; finances are finite, despite the contrary appearance Hollywood often provides. Lengthy litigation could conceivably result in the failure of studios and production companies, disrupt corporate plans, stall blossoming careers and destroy other careers through retribution for turning to judicial

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[195] *See* Johnson, *supra* note 181, and accompanying text.

[196] *See supra* note 167 and accompanying text.

[197] *See supra* note 181 and accompanying text.

[198] 1 MACNEIL ET AL., *supra* note 168, § 3.2.7, at 3:20–3:21 (citations omitted).

resolutions. However, such desire for fast resolutions must not overwhelm consideration of the substantial necessity for accurate credit determinations, given the significance of credits. Preservation of the integrity of credit entails quantifying a fundamentally abstract, inherently immeasurable creative process; there is no system that could satisfactorily resolve such an analytical paradox beyond a doubt. The WGA credits arbitration system is one arguably born from necessity, then, designed to be as fair and accurate as possible while retaining the significance of limited writing credits and concurrently meeting the industry need for speed.

The need for anonymity is equally compelling. Preservation of relationships is critical in an industry in which the adage "NOBODY KNOWS ANYTHING"[199] contains an inherent truth, if overstated. Career-oriented participants in a credits determination cannot risk creating substantial ill-will. Careers blossom overnight, fortunes rise and fall and today's opponent may be tomorrow's critical decisionmaker, who has the power either to help the screenwriter's career flourish or to destroy it completely.

The courts have recognized these needs. In both *Ferguson* and *Marino*, the respective courts, confronted with a process embedded in the collective bargaining agreement of the union representing screenwriters, deferred to the right of the union members to collectively determine an aspect of their professional and economic lives. Balancing the potential for imperfection against a presumed probability of fairness, the courts have upheld the arbitration process. The precedential value of such holdings has failed to preclude all challenges to the arbitration process, as each new film season will invariably be accompanied by new contentions of a failed system, sometimes in the forum of the courts.[200] Further, the impact of this

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[199] GOLDMAN, *supra* note 4, at 39.

[200] *See, e.g.*, *Guild Arbitrators, Zapped Over "The Cable Guy," Start "The Rock" Quarrel*, 7 WORLD ARB. & MED. REP. 127 (1996); Welkos, *supra* note 177, at F1. Both films, released in the summer of 1996, resulted in the writers challenging the WGA credits arbitration process. The *Cable Guy* challenge resulted in a lawsuit, initially brought in state court, that was withdrawn after removal to federal court. The Guild had threatened to seek monetary sanctions for "frivolous legal challenges" to the credits arbitration process; the screenwriter bringing the claim may refile. *See Writer Pulls Plug on "Cable Guy" Suit*, 7 WORLD ARB. & MED. REP. 152 (1996). In the case of *The Rock*, screenwriter Jonathan Hensleigh was denied credit by the arbiters, despite receiving support from both the film's producers and its director, the latter of whom stated that "this result is a sham, a travesty. . . . No objective person could read Mr.

relatively unusual system of ADR may extend beyond Hollywood[201] and into other areas of creativity and commerce. As noted, the credits arbitration process has been cited as a potential model for resolving credit determination on composite works produced within the university setting,[202] and at least one scholar has routinely held forth *Marino* as indicative of judicial acceptance of novel arbitration methods barring litigation through collective bargaining agreements, with implications extending beyond the fields of entertainment, the arts and sports and into similarly complex areas of commerce demanding quick resolutions to disputes.[203]

To be certain, such a system of anonymous arbiters that is devoid of face-to-face encounters is not equally appealing to everyone, nor should it have to be. Opponents may argue that justice is not served by such a system, yet when adhering to more traditional methods of dispute resolution would result in the needless collapse of a business enterprise or essentially moot victories, the justice achieved would arguably be pyrrhic. If the demands of an industry or situation require both speed and anonymity, consideration of a need-specific procedure similar to the WGA credits arbitration process should be undertaken as a potentially viable alternative to both protracted litigation and more traditional models of arbitration.[204]

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Hensleigh's shooting draft, compare it to the previous writers' drafts and come to this conclusion." Welkos, *supra* note 177, at F6.

[201] The use of arbitration systems modeled after the WGA process may become more pervasive in Hollywood. The newly formed Producers Credit Board has stated that it will seek to establish arbitration panels to help resolve disputes over producing credits. *See* Bernard Weinraub, *Movie Producers Want Only Credit Due*, PLAIN DEALER (Cleveland), June 27, 1997, at 4E.

[202] *See* Dreyfuss, *supra* note 162, at 640 n.178.

[203] *See supra* note 161.

[204] One treatise in its discussion of arbitration in general noted:

> As [then] Judge Ginsburg has put it, the legislative policy favoring arbitration "is at its strongest where the arbitration will be governed by procedures specifically tailored to the context from which the agreement to arbitrate arises, and will be conducted by arbitrators who are expert in the norms and practices of the relevant industry."

1 MACNEIL ET AL., *supra* note 168, § 3.2.7, at 3:21 (quoting Pearce v. E.F. Hutton Group, Inc., 828 F.2d 826, 829 (D.C. Cir. 1987)).